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No. ~~84692-4~~

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STATE OF WASHINGTON
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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

ARTHUR WEST
appellant,

Vs.

CHRISTINE GREGOIRE, GOVERNOR OF THE STATE OF
WASHINGTON, STATE OF WASHINGTON,
respondents

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On appeal of rulings of the Honorable Paula Casey

APPELLANT'S OPENING BRIEF

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*Portions of this brief
have been redacted
per Commissioner's 4-1-11 Ruling.*

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INTRODUCTION.

This appeal concerns the question of whether the Constitution of the State of Washington provides for an executive privilege that supersedes the Public Records Act.

The Trial Court, in a decision that neither the State or the appellant concur in, declined to address the issue of whether such a privilege may properly be implied from the implied doctrine of separation of powers, while assessing penalties for the unlawful withholding of records in the absence of a determination of the underlying issue of the existence of the claimed exemption.

Thus, the primary issues presented are whether the Superior Court erred in declining to determine whether the Constitution of the State of Washington contains any provision, express or implied, that supersedes the Public Records Act adopted by the Legislature and the People and allows for assertion of an Executive Privilege, when such a determination was necessary to resolve an actual controversy and was required for any proper determination of the appropriate penalty.

This case involves the invocation of a claim of Executive Privilege by the Office of the Governor in regard to records prepared by the Office of Financial Management for a meeting and negotiation session with the Washington Association of Counties and Washington Association of Cities, public agencies who at the time of the meeting were acting under false color of ostensibly “private” status.

The State argues that the doctrine of executive privilege, founded upon the separation of powers, supersedes the public records disclosure requirements of the Public Records Act and other laws, and provides an exemption to such disclosures that is not subject to review without a showing of need.

The clear wording of the State Constitution, as well as the manifest intent of the Public Records Act support the conclusion that the people do not yield their sovereignty to the agencies that control them in the manner envisioned by the State.

The very concept of an executive privilege is contrary to the manifest intent of the Washington State Public Records Act, as

enacted by an initiative by the people of the State of Washington in 1973, and as it has been amended over nearly 40 years.

This Court should exercise its discretion to act decisively to resolve the issue of whether the privilege exists once and for all.

ASSIGNMENTS OF ERROR

I The Court erred in failing to resolve an existing controversy of substantial importance involving the public's right to know and the conduct of the State's Chief Executive Officer, when it was apparent in the record that records were still being suppressed under claim of executive privilege. (See the Court's Orders at CP157-8, 134-70)

II The Court Erred in failing to declare that the Public Records Act is a Constitutional Statute that does not include or allow a executive privilege exemption, and in failing to recognize that the Washington Constitution does not provide a basis for inferring such a privilege. (See the Court's Orders at CP157-8, 134-70)

III The Court erred in conducting the "Yousoufian" penalty analysis without first determining the necessary underlying issue of whether

Executive Privilege was a legitimate exemption under the PRA, in failing to weigh the Yousoufian factors appropriately, and in failing to properly award penalties for each day the records were withheld.

(See the Court's Orders at CP 157-8, 164-70)

ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

I Did the Court err in failing to resolve an existing controversy of substantial importance involving the public's right to know and the conduct of the State's Chief Executive Officer?

II Did the Court err in failing to declare that the Public Records Act is a Constitutional Statute that does not include or allow an executive privilege exemption?

III Did the Court err in conducting the "Yousoufian" penalty analysis without first determining the necessary underlying issue of whether Executive Privilege was a legitimate exemption, in failing to weigh the Yousoufian factors appropriately, and in failing to properly award penalties for each day the records were withheld?

STATEMENT OF THE CASE

This case involves a public records request for records concerning the Relationship between the Governor and the Washington Association of Counties. (CP at ~~3-8~~,)

After first misplacing and misdirecting the request, and following a second request from plaintiff as to the status of the request, respondent asserted executive privilege in regard to a document concerning a meeting between the governor and the AWC and WSAC. (CP at ~~20-26~~)

On January 11, 2010, Plaintiff filed the complaint in this case. An Order to show cause was signed ex parte that day. (CP at ~~3, 9-18~~)

On January 19, plaintiff filed an Amended complaint to include other claims of executive privilege asserted by the Governor to deny disclosure of records. (CP at ~~71-72~~)

On January 22, a motion hearing was held and the matter was continued. (CP at)

On February 5, 2010, plaintiff's filing of an Amended Complaint was stricken for failure to serve defendants. (CP at ~~71-72~~)

On February 12, the Show Cause hearing was continued for the purpose of the Court being more fully informed of the nature of the Office of Financial Management. (CP at ~~118-126~~

On February 24, the Court requested the filing of the record for in Camera Review. (CP at ~~96-117~~)

On Feb 26, a hearing was held and the record was voluntarily filed for the Court's in camera review. (CP at ~~156~~)

On March 12, the Court Ordered the record disclosed, but failed to rule on the issue of whether an Executive Privilege exemption existed. (CP at ~~157-8~~)

On April 2, the Court heard argument on penalties, and entered findings of fact, conclusions of law, and an Order. (CP at ~~164-170~~)

On April 12, the plaintiff moved for reconsideration. (CP at ~~18~~)

On April ~~20~~, 2010, an Order denying reconsideration was issued. (CP at ~~190-191~~)

On June 1, 2010, following the memorial day weekend, a timely notice of appeal was filed. (CP at ~~195-205~~)

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ISSUE III The Court erred in conducting the “Yousoufian” penalty analysis without first determining the necessary underlying issue of whether Executive Privilege was a legitimate exemption under the PRA, in failing to weigh the Yousoufian factors appropriately, and in failing to properly award penalties for each day the records were withheld.

With all due respect to the Honorable Judge Casey, appellant contends that the determination of a penalty without deciding the underlying issue of whether the claimed exemption existed was an abuse of discretion that prevented the reasonable consideration of the proper assessment of penalties under the PRA.

In addition, plaintiff

In *State ex rel Ross v. Superior Court*, 132 Wash. 102, 107, 231 P. 453 (1924), (cited in *Coggle v. Snow*, 56 Wn. App. 499, 784 P.2d 554, (1994) the court, in considering a motion for change of venue, stated that “discretion in this regard is never arbitrary. It must, like discretion in other matters, be based on reason.”

The appellant contends that the Court's failure to put an end to the controversy by declaring the rights of the parties was compounded and exacerbated by the assessment of a minimal penalty in the absence of a ruling on the propriety of the executive privilege exemption.

The result was a penalty that would surely fail to deter the State from continuing to employ the exemption in the absence of any clear precedent, and which would act to deter the plaintiff from further actions to challenge the same exemption when it continues to be employed by the State, as it continues to be employed by the executive to conceal records from the public.

The Court erred and committed an abuse of discretion in failing to establish the existence or non-existence of the executive privilege exemption prior to making its penalty determination, in finding all of the mitigating factors to be present when such a finding was not supported in the record, and in failing to find that any of the aggravating factors were present when the information withheld concerning the operations of the governor's office, as well

as those of the OFM and the WSAC were of foreseeable public importance, when the agency misrepresented the content of the record in an attempt to evade an in camera review completely.

Plaintiff respectfully takes exemption to each and every one of the mixed findings of fact and law*entered by the Court, as set forth verbatim in the integral appendix incorporated into this brief as follows:

FINDINGS OF FACT

1. The subject matter of this case is a document withheld by the Governor's Office in response to requests for public records made by Plaintiff, Arthur West, on November 16, 2009 and December 1, 2009.

2. In compliance with RCW 42.56.580. the Governor's Office has designated a Public Records Officer, Melynda Campbell.

* 1-20 and 1-7

3. On November 16, 2009 Plaintiff delivered to the Governor's Office ^{me page} a memorandum addressed to "WASHINGTON STATE GOVERNOR CHRISTINE GREGOIRE AND WSAC DIRECTOR ERIC JOHNSON." The memorandum began with a line identifying its subject "RE: ATTENDANCE AT SECRET SHADOW GOVERNMENT EVENT, AKA (WSAC 2009 ANNUAL CONFERENCE)." Plaintiff's request for records appears in the last paragraph of this 5 paragraph memorandum. ^{NY AQ} *The memorandum contained an attachment.*

4. The Plaintiff's memorandum was routed to the Governor's Constituent Services Unit which receives and processes most incoming mail directed to the Governor's Office.

5. On December 1, 2009, eight (8) business days (14 calendar days) after delivery of the memorandum to the Governor's Office, Plaintiff sent an email to the Communications Director for the Office of Financial Management (who was then on temporary assignment to the Governor's Office), with a copy to Martin C. Loesch, Director of External Affairs and Senior Counsel to Governor Gregoire, stating that he had submitted a public records request to the Governor's Office on November 14, 2009, but had not received any response.

5. Mr. West's December 1, 2009, email also asked for additional public records, including an August 2, 2006, proclamation of the Governor relating to WSAC, and speeches by the Governor to WASC from 2005 to the present.

6. Both Mr. Kuper and Mr. Loesch immediately forwarded this email to Melynda Campbell, the designated Public Records Officer for the Governor's Office.

7. Ms. Campbell immediately contacted the Governor's Constituent Services Unit and asked it to check whether it had Mr. West's request. Within the hour, CSU responded to Ms.

Campbell sending a copy of the memorandum to her and explaining that it had not noted the public records request at the bottom of the document.

8. On that same afternoon, December 1, 2009, Ms. Campbell notified staff of the Governor's Office of Mr. West's public records request, and directed staff to advise her of documents responsive to Mr. West's request.

9. Also on that same afternoon, December 1, 2009, Ms. Campbell sent an email and letter to Mr. West, letting him know that his memorandum dated November 14, 2009, hand delivered to the Governor's Office on November 16, 2009, had not initially been identified as a public records request. Ms. Campbell also let Mr. West know that she would provide an estimate of the time required to respond to his public records request within two days, and apologized for the delay.

10. Mr. West responded the next day, stating that he had a deadline of December 7th in a case concerning the status of WSAC, for filing information about WSAC, and that he was hoping to receive the proclamation that he had requested and whatever other information was readily available by that date. In response, Ms. Campbell then sent another email to office staff informing them of Mr. West's desire for an expedited response.

11. The following day, December 3, 2009, Ms. Campbell sent 57 pages of responsive documents to Mr. West by email. This included the proclamation by the Governor that Mr. West had specifically asked to receive by December 7th. Although providing the documents involved costs to the Office of the Governor, Mr. West was not asked to pay for these copies. Ms. Campbell's letter advised Mr. West that searches were still ongoing, and that she would let him know if additional documents were located.

12. On December 17, 2009, Ms. Campbell provided an additional 299 pages of documents responsive to Mr. West's request and an exemption log. One 3-page document was withheld. Plaintiff was not asked to pay the costs of producing these records. This completed the response of the Governor's Office to Plaintiff's requests.

13. The privilege log identified the document, "PRR 71-73"; its date "April 8, 2009;" the author, "Kathleen Drew"; the recipient "Governor Gregoire"; the type of document, "Briefing Document"; and exemption, "Executive Privilege."

14. On January 11, 2010, Plaintiff filed this action under the Public Records Act, RCW 42.56, claiming that the above-described assertion of executive privilege by the Governor's Office violates the Public Records Act.

15. At Plaintiff's request, on January 11, 2010, the Court issued an *ex parte* Order To Show Cause to the Office of the Governor. The Order directed the Governor's Office to show cause on January 22, 2010, why it should not be found in violation of the Public Records Act based upon the above-described assertion of executive privilege. Upon Plaintiff's request, the show cause hearing on January 22, 2010 was continued to February 5, 2010. Upon Plaintiff's request, the show cause hearing on February 5, 2010, was again continued to February 12, 2010, on Plaintiff's waiver of any PRA penalties during this period.

16. The Governor's Office briefed the constitutional executive privilege of the state's chief executive asserted by the Governor's Office, submitted supporting declarations, and presented argument on the Order to Show Cause. Plaintiff likewise briefed the matter, submitted supporting materials, and presented argument opposing the privilege.

17. On March 12, 2010, the Court entered Findings of Fact, Conclusions of Law and Order Compelling Disclosure, requiring that the briefing document be produced to Plaintiff. The Court concluded that "[t]he Document at issue contains a recitation of what positions of different entities are and what proposed legislation is before the Legislature, and does not contain advice to the Governor." The Court concluded that "as such [the Document] would not be subject to a claim of executive privilege if one were found to exist", and further concluded that the court "needs not address the issue of whether an executive privilege exists in the State of Washington."

18. On the same date, March 12, 2010, counsel representing the Governor's Office provided a copy of the briefing memorandum to Plaintiff.

19. The Governor's Office did not respond to Plaintiff's November 16, 2010 public records request within the initial 5 day period set forth in RCW 42.56.520. ^{WJ Res} This failure was the product of human error. While not excusable, the form of Mr. West's request was unclear and foreseeably would contribute to this error. The public records officer for the Governor's ^{WJ Res} office was ~~well-trained~~ properly trained and systems were in place to track and respond to requests for records.

20. Subsequent to December 1, 2009, when the Governor's Office first recognized that Mr. West had made a public records request, it acted ^{WJ Res} immediately and expeditiously to respond to this request and completed its response in a reasonably timely manner.

CONCLUSIONS OF LAW

1. The Governor's Office acted in good faith throughout this case in responding to Plaintiff's public records requests and in asserting executive privilege.
2. The Court has considered the entire penalty range of the Public Records Act, and all of the aggravating and mitigating factors identified in *Yousoufian v. Office of Ron Sims*, No. 80081-2, filed March 25, 2010. *All the mitigating factors have application. None of the aggravating factors apply to these facts.*
3. An agency is afforded a reasonable time to respond to a public records request under RCW 42.56.520.
4. Based on all of the relevant *Yousoufian* factors and the facts of this case, the appropriate penalty period is 87 days, representing the period between Plaintiff's November 16, 2009 request, and March 12, 2010 when Plaintiff received the single record at issue in this case, exclusive of 7 days during which plaintiff waived penalties to secure a second continuance of the show cause proceeding, and exclusive of 22 days which represents a reasonable period for the Governor's Office to respond to Plaintiff's public records requests in this matter.
5. Based on all of the relevant *Yousoufian* factors and the facts of this case, *\$25* is the appropriate daily penalty. The Governor's office exercised good faith throughout this matter. The remaining *Yousoufian* factors also favor a penalty at the *lower end of the* ~~minimum~~ statutory range.
6. Plaintiff is awarded his filing fee and \$200 in statutory costs. *Plaintiff is otherwise denied* ~~costs for failure to substantiate them.~~
7. Plaintiff's request for findings under CR 54(b) is denied.

The Court further erred and acted at variance to the facts of the case when it failed to consider the potential for public harm in the form of a loss of government accountability, the unreasonableness of asserting an exemption that (the appellant contends) did not exist in law, lack of strict compliance with the 5 day response period requirement, and when it completely refused to consider a penalty amount necessary to deter future misconduct considering the size of the agency and the facts of the case.

For these reasons, plaintiff respectfully requests that this Court explicitly reject the claims of the executive as to the existence of an executive privilege and remand this case for the Trial Court to reconsider the penalty imposed in light of the material circumstance that the claimed privilege did not exist in law.

The PRA has often been recognized as a strongly worded mandate for disclosure, which should be liberally interpreted to promote its remedial intent.

Penalties intended to effectuate its intent with a real deterrent

effect are a necessary part of the statute as it was adopted and as it has been interpreted for many years. In this case the Court erred in strictly applying the “Yousoufian” factors in a manner that failed to consider the necessary underlying issue of the improper and ongoing use of the exemption it refused to rule upon, or the necessity of an actual deterrent to the further use of an untested exemption to evade disclosure and place unreasonable burdens upon the public.

As such, the Court, by assessing a minimal penalty for less than the actual number of days the records were withheld actually encouraged the continuing use of the phantom exemption by the Governor, and acted to economically deter the plaintiff from further attempts to support the public's right to know, or to hold government accountable for its actions.

The intent of any penalty in law is to be sufficiently harsh to deter further such conduct. It is undoubtedly a fact that the number banks robbed by John Dillinger and his gang constituted a very small percentage of the number of banks that they failed to hold up, and that as such this circumstance might be seen to be a significant

mitigating factor. Likewise, it is a fact subject to judicial notice that the City of Lakewood has over 230 Police Officers who were not shot by Maurice Clemmons. However, if our justice system saw fit to impose a minimal penalty on these types of malefactors based upon such a flawed analysis, it would be viewed as an outrage and an implicit Carte Blanch for them to commit further depredations.

Just so, this Court's minimal penalty, in large part based upon the records that were not withheld, and assessed in the absence of a judicial ruling on the existence of the asserted privilege, cannot be reasonably viewed as anything other than an implicit judicial sanction of the use of the executive privilege exemption, and an indication that the State will continue to receive what is in effect a free pass from adjudication of the legitimacy of the exemption and a mere slap on the wrist for its continuing conduct in violation of the express terms of the law, while the plaintiff will suffer the economic and legal burdens of maintaining numerous actions just to find out what his government is doing, with absolutely no hope of ever being made whole for the immense effort required to brief and argue a

completely untested exemption, both in the trial Court and on appeal.

Such a result cannot be a true expression of either the intent of the Supreme Court in the most recent incarnation of the Yousoufian decision, *Yousoufian v. Sims*, 168 Wn.2d 444; 229 P.3d 735; (2010) or the clear and unambiguous and remedial statutory language of the PRA itself, which cannot be constitutionally amended by any judicial act, under the doctrine of separation of powers that the State sought so valiantly to uphold in this case (on the flimsiest of pretexts), when it was in their interest to do so.

By refusing to award penalties for the entire period the records were withheld, the Court erred in refusing to follow the black letter precedent of the Supreme Court in both *Koenig* and *Yousoufian* where the Supreme Court twice overturned a trial courts' determinations that such a reduction was permissible. As the Supreme Court noted in *Koenig*...

After the Court of Appeals issued its decision, we decided *Yousoufian v. Office of King County Executive* , 152 Wn.2d 421 ,

98 P.3d 463 (2004), where we held the public disclosure act requires a penalty be imposed for each day a record is withheld,... Once the trial court determined Mr. Koenig was entitled to inspect the records, it was required to assess a penalty within the statutory range for each day the records were withheld Koenig v. City of Des Moines, 158 Wn. 2d. 173, at 189, (2006)

The procedures in the public disclosure act are complicated and difficult enough without requiring citizens seeking disclosure to re-litigate the same determinations over and over again, for decades. In both Koenig and Yousousfian, the plaintiff/appellants were required to litigate for over a decade, and in the process each of them was successful in obtaining a published opinion of the Supreme Court that Division I of the Court of Appeals erred in allowing the Trial Court to exercise discretion in reducing the amount of days that a penalty was required for nondisclosure. Under these Supreme Court precedents, “a per day penalty must be assessed for each day the requested records were wrongfully withheld” Yousoufian v. Office of King County Executive 152

Wn.2d 421 at 424, (2004), Koenig v. City of Des Moines 158 Wn.2d 173, (2006). It is not in dispute that the correct number of penalty days in this case from the date the original request for records in this case was filed by West until the record was produced is 109.

Yet despite setting forth these facts particularly in its own Order, this Court erred in failing to award penalties for each day the records were actually withheld from inspection. The failure of the Court to require penalties to be awarded on the undisputed facts in a manner consistent with the two decisions of the Supreme Court is disheartening.

Does this mean litigants such as Koenig must argue for a decade to establish a principle, in published opinions of the Supreme Court, just to have it ignored in the next proceeding? Such rulings do not foster confidence in the impartiality of justice or even further the interest of judicial economy.

The initial confusion on the part of the agency may be a basis

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for reducing the penalty for that time, but the Court lacks discretion to omit any penalty whatsoever for that period of time.

Upon determination of the issue of the executive privilege issue, this court should consider an order of remand for the purpose of re-assessing the penalty amount.

CONCLUSION

Repealing the Public Records Act, now codified as Chapter 42.56 RCW, both the people and the legislature of this state have declared and affirmed a policy of open government. (See RCW 42.56.030). A decision to create or to allow the continued exploitation of the expansive privileges claimed by the State here would utterly contravene this policy, as well as the constitutional mandate assigning such policy decisions to the legislature. See *Moran v. State*, 88 Wn. 2d 867, 875, 568 P.2d 758 (1977). ("We must always remember that we are not a super legislature. It is not our role in government to enact legislation or to add provisions or to change provisions in legislation which are otherwise clear.").

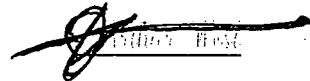
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judicially create the claimed privileges, on whatever grounds, will almost certainly alter the fundamental public policy of this State as set forth in the PRA.

However, a continuing refusal to this court to rule will only encourage and perpetuate the uncertainty and confusion as to what the proper scope of the executive privilege is in this state.

The Court should meaningfully exercise its authority to issue a declaratory ruling rejecting the attempt by the executive to create these privileges out of whole cloth, in a manner contrary to the will of both the people and the legislature. I certify this document was transmitted to the Governor on January 18, 2011.

Done January 17, 2011.


Clerk of the Court